Supreme Court, U.S.
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No. 94-1760

In The

# Supreme Court of the United States

October Term, 1994

60 KEY CENTRE, INC.,

*Petitioner,*

*vs.*

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION and ACQUEST HOLDINGS, INC.,

*Respondents.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does General Services Administration Regulation § 552.270-3(a) unlawfully permit the General Services Administration to accept bid proposals submitted after the deadline for submitting initial proposals as set forth in Solicitations for Offers thereby conflicting with the Competition in Contracting Act of 1984, 41 U.S.C. § 253a(b)(2)(B)(ii)?

2. Does General Services Administration Regulation § 552.270-3(a) unlawfully permit the General Services Administration to accept bid proposals submitted after the deadline for submitting proposals as set forth in Solicitations for Offers thereby conflicting with Federal Acquisition Regulation § 15.412?

3. Is the General Services Administration's reliance on General Services Administration Regulation § 552.270-3(a) to accept late initial offers inherently unfair and does it thereby contradict the bona fides of the Federal Procurement System and the congressional intent in enacting the Competition in Contracting Act to foster full, open and fair competition in the federal procurement process?

## LIST OF PARTIES

The parties to the proceedings are:

*Petitioner:*

60 Key Centre, Inc., having the following corporate shareholders:

Yale University

Wredco Key Centre, Inc.

Signature Properties International, L.P.; and

*Respondents:*

Administrator of the General Services Administration; and Acquest Holdings, Inc.

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## OPINIONS BELOW

The opinion, order and judgment of the United States District Court for the Western District of New York, denying petitioner's request for injunctive and declaratory relief, is unreported. *60 Key Centre, Inc. v. Administrator of General Services Administration and Acquest Holdings, Inc.*, No. 1993 Civ. 0154A (MBM), 1994 WL 25842 (W.D.N.Y. Jan. 25, 1994) (opinion in support of judgment).[1] (App. D, 18a-37a).

The decision of the Second Circuit Court of Appeals affirming the judgment of the District Court is reported. *60 Key Centre, Inc. v. Administrator of General Services Administration and Acquest Holdings, Inc.*, 47 F.3d 55 (2nd Cir. 1995). (App. A, 1a-14a).

## STATEMENT OF JURISDICTION

This Court's jurisdiction to review the decision and judgment of the United States Court of Appeals for the Second Circuit, denying petitioner's application for injunctive and declaratory relief is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioner originally brought this case in the United States District Court for the Western District of New York pursuant to 5 U.S.C. § 701 *et seq.* seeking judicial review of adverse action taken by the GSA. Petitioners sought to enjoin respondent, Acquest Holdings, Inc. ("Acquest") from continuing to perform a lease awarded by the GSA and also sought declaration that 60 Key be adjudicated the successful bidder. A final judgment in

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1. The Honorable Michael B. Mukasey of the United States District Court for the Southern District of New York sitting by designation. Because this case impacted upon the United States Courthouse for the Western District of New York, the judges in the Western District recused themselves and Judge Mukasey was designated pursuant to 28 U.S.C. § 292(b).

respondents' favor was entered by the District Court on January 25, 1994. (App. C, 17a). Petitioners filed a timely notice of appeal to the Second Circuit Court of Appeals on February 7, 1994. Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the review of the final judgment of the District Court.

The Second Circuit affirmed the District Court's decision on February 1, 1995. 47 F.3d 55 (2nd Cir. 1995). (App. A, 1a-14a).

This petition for writ of certiorari is timely filed within 90 days of February 1, 1995 by May 1, 1995.

## STATUTES AND REGULATIONS INVOLVED

I. The Competition in Contracting Act (CICA) 41 U.S.C. § 253a(b)(2)(B)(ii) regarding Planning and Solicitation requirements, provides in pertinent part:

> In addition to the specifications described in sub-section (a), each solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include. . . .
>
> (2)(B) In the case of competitive proposals—
>
> (ii) The time and place for submission of proposals.

II. Federal Acquisition Regulation (FAR) § 15.412, which provides in pertinent part:

> (b) Offerors are responsible for submitting offers, and any modifications to them, so as to

> reach the Government office designated in the Solicitation on time. . . .
>
> (c) Proposals, and modifications to them, that are received in the designated Government office after the exact time specified are late and shall be considered only if (i) they are received before an award is made; and (ii) the circumstances, including acceptable evidence of date of mailing or receipt at the Government installation, meet the specific requirements of the provision at 52.215-10, Late Submissions, Modifications and Withdrawals of Proposals.

III. General Services Administration Regulation (GSAR) § 552.270-3(a) which provides in pertinent part:

> Any offer received at the office designated in the Solicitation after the exact time specified for receipt of best and final offers will not be considered unless it is received before award is made and it . . . [satisfies specified mailing requirements or is the only offer received].

IV. General Services Administration Handbook, *Acquisition of Leasehold Interests in Real Property*, PBS P 1600.1A Chapter 2-7(f), "Distribution of solicitation of offers," which provides in pertinent part:

> A specific date for submission of offers shall be stated. Any time extensions given to one offeror must be given to all and must be in writing.

## STATEMENT OF THE CASE

### Procedural History

Petitioner, 60 Key Centre, Inc. ("60 Key") is the owner of twin office towers in Buffalo, New York. 60 Key sought to lease over 50,000 square feet of office space to the United States Attorneys Office by responding to a Solicitation for Offers issued by the GSA, the contracting arm of the United States Government.

The Solicitation for Offers ("SFO") set forth numerous requirements for the space sought by GSA, as well as eligibility requirements for offering space. One specific requirement of the SFO was that offers be received by the GSA no later than February 26, 1992. It is undisputed that 60 Key submitted its offer on February 25, 1992 in a timely manner, and that Acquest submitted its offer on or about August 10, 1992 and therefore more than five months late. (App. A, 4a). Although there were five initial offerors, 60 Key and Acquest were the only remaining responsive offerors at the time of lease award. Acquest was awarded the lease on January 22, 1993 and this lawsuit ensued.

60 Key raised numerous challenges to the propriety of the award to Acquest, including that for which review is sought herein, that Acquest's offer was late and should have been disqualified.

60 Key was denied injunctive and declaratory relief after a preliminary injunction hearing was consolidated with the trial on the merits pursuant to Rule 65(2) Fed. R. Civ. P.

The Second Circuit Court of Appeals affirmed, "substantially for the reasons stated in the opinion of the District Court" (App. A, 7a) and addressed only 60 Key's challenge to the timeliness of Acquest's bid.

During the pendency of the appeal and before oral argument, but after the briefs had been filed, 60 Key wrote to the court pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, to bring to the court's attention the recent decision of *Aerolease Longbeach v. United States,* 31 Fed. Cl. 342 (1994), *aff'd,* 39 F.3d 1198 (Fed. Cir. 1994) (table). The court below solicited letter briefs addressing (1) the correctness of the *Aerolease* ruling, and (2) the proper disposition of the appeal if that ruling is correct. (App. A, 8a).

In *Aerolease,* the United States Court of Federal Claims ruled that GSAR § 552.270-3(a) illegally permits the GSA to accept proposals submitted after the deadline for initial proposals but before the deadline for Best And Final Offers (BAFO) set forth in the SFO. The court in *Aerolease* held that GSAR § 552.270-3(a) was invalid because it violates law (41 U.S.C. § 253(a)(b)(2)(B)(ii)), it violates regulation (FAR § 15.412) and it is unfair because it violates the bona fides of the procurement system and breaches the obligation imposed by Congress upon agencies to consider all bids and proposals fairly and honestly (*see Aerolease, supra,* 31 Fed. Cl. at 366-367).

The Second Circuit Court of Appeals held:

> The GSA's policy of allowing bids to be submitted up to the BAFO deadline effectively enhances competition, as it occurred in this case. Thus, we perceive no conflict between GSAR § 552.270-3(a) and either the literal requirements of 41 U.S.C. § 253a(b)(2)(B)(ii) or the underlying policy of CICA to enhance competition.

(App. A, 12a).

With respect to the asserted conflict with FAR § 15.412, the Second Circuit held:

> Plainly, this provision spells out the consequences of a late submission, but does not mandate any particular action by the GSA with respect to setting the deadlines to which those consequences will attach. Moreover, the provision does not define what constitutes a late submission and therefore does not contradict the GSA's policy of accepting proposals before the deadlines for BAFOs.

(App. A, 13a).

Lastly, with respect to the unfairness of allowing a late bidder to submit an initial offer after the date specified in the SFO, the court below held:

> In sum, we perceive no innate unfairness in a procurement system that encourages early submission of proposals, but does not deprive the government or the public of the benefit of later, more advantageous offers.

(App. A, 14a).

This petition seeks review of the Second Circuit's decision holding that GSAR § 552.270-3(a) does not conflict with 41 U.S.C. § 253a(b)(2)(B)(ii), does not conflict with FAR § 15.412, and that it is not unfair.

## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

This case presents the important unanswered questions of whether GSA's reliance upon GSAR § 552.270-3(a) to justify the acceptance of initial offers after the deadline set forth in an SFO should be invalidated as conflicting with federal law and regulation and because is inherently unfair. These questions are important because of the congressional intent in enacting CICA of fostering a fair, open and equitable federal procurement process to encourage contractors to do business with the government. In the absence of fair play and a regulatory framework upon which participants may faithfully rely, there is less incentive to deal with the government, which will deprive the government and thereby the people of the United States, of the benefit of truly superior proposals whose offerors will choose to limit their sphere of business relationships to the private sector.

The near unfettered discretion of the GSA and its self-serving and unreasonable interpretation of its regulations, as affirmed by the court below, will permit a system of favor and patronage, as well as staff whim, rather than the competitive regulatory scheme envisioned by Congress.

The respondents argue that the GSAR clause at issue allows the GSA to accept initial offers submitted any time on or before the date set by the contracting officer for the submission of best and final offers, regardless of whether the date for initial offers has expired and other offerors have complied with said date. In this case, the SFO specified a due date of February 26, 1992. Petitioner submitted its offer on February 25, 1992. Acquest

submitted its offer on or about August 10, 1992, more than five months after the date specified in the SFO for the receipt of initial proposals.

The Second Circuit affirmed the District Court's decision denying petitioner injunctive and declaratory relief holding that the GSAR provision at issue did not conflict with federal law or regulation and the court "perceived no innate unfairness . . ." (App. A, 14a).

The CICA provision relied upon by petitioner, 41 U.S.C. § 253a(b)(2)(B)(ii) provides in part that the SFO shall include the time and place for submission of proposals. Thus, the requirement that an initial proposal be submitted by a specific date, place and time, as set forth in the SFO is one of the minimum requirements of CICA. It is notable that GSA's Handbook, *Acquisition of Leasehold Interests in Real Property,* (PBS P 1600.1A Ch. 2-7(f)) similarly provides that, "A specific date for submission of offers shall be stated. Any time extensions given to one offeror must be given to all and must be given in writing." Ostensibly in compliance with CICA and GSA guidelines, the SFO herein at § 1.5 provides, "Offers are due by February 26, 1992 and must remain open until August 3, 1992."

However, according to the GSA, it has consistently interpreted and applied GSAR § 552.270-3(a) to allow for the consideration of bids received before the deadline for BAFOs and that the date for the submission of initial bids stated in the SFO is a date by which the GSA is looking to get expressions of interest, but that GSA accepts offers up until close of BAFOs as a matter of policy. (App. A, 10a).

It is the position of petitioner that GSA's interpretation contradicts CICA and GSA's own guidelines and is therefore invalid. Offers should not be accepted after the date specified.

According to the court below, with respect to petitioner's argument:

> The statute's language does not require this reading, however, because § 253a(b)(B)(ii) provides only that a time and place for submission must be stated in the SFO, and does not assert any penalty for bid submissions after this date. It cannot be disputed that the GSA included a time for submission of offers in the SFO, thus complying with the literal requirement of § 253a(b)(2)(B)(ii).

(App. A, 11a).

The affirmation by the Second Circuit of GSA's interpretation allows an agency regulation which is inconsistent with statute. This determination should be reversed and the GSA regulation declared a nullity. *Manhattan General Equipment Co. v. Commissioner of Internal Revenue Service,* 297 U.S. 129, 134, 56 S. Ct. 397, 400 (1936). The GSA regulation at issue renders meaningless the CICA requirement that the SFO contain the time and place for the submission of proposals. In fact, by claiming that offers will be accepted up to the date set for receipt of BAFOs by the contracting officer (a date not specified in the SFO), the SFO in actuality contains no specific due date, which is a direct violation and contradiction of the CICA provision which states that the solicitation shall contain a statement setting forth the time and place for submission of proposals (*see also, Aerolease, supra,* at 366).

It is also the position of petitioner that GSA's interpretation of GSAR § 552.270-3(a) conflicts with FAR 15.412 which provides in part that if an offeror submits an offer after the due

date specified in the solicitation, the offer is late. The court in *Aerolease* found that the contracting officer's allowance of a late submission of proposal after the initial deadline was contrary to FAR. According to the court in *Aerolease,* "GSAR 552.270-3(a) specifically contradicts FAR 15.412 from requiring the submission of initial proposals by the date established in the SFO to allowing submission of initial proposals by the date established by the contracting officer for BAFOs. Such a contradiction constitutes a deviation." *Aerolease, Id.* at 366-367. The court went on to rule that the deviation was unauthorized. The court in *Aerolease* continued, "Here, as the contracting officer applied a regulation that deviates from the requirements of the FAR to allow the submission of a late initial offer by One Airport Plaza, this Court excludes that offer from the instant solicitation. Additionally, if an agency regulation improperly deviates from the FAR, the agency regulation is invalid." *Aerolease, id.* at 367.

60 Key raised the same arguments before the court below, as raised in *Aerolease* regarding the conflict between the GSAR and FAR. However, rather than addressing the conflict, the court merely stated that the FAR provision, "[S]pells out the consequences of a late submission, but does not mandate any particular action by the GSA with respect to setting the deadlines to which those consequences will attach." (App. A, 13a). Because the court failed to recognize the inconsistency, its response is inapposite. FAR 15.412 mandates submission of offers by the SFO deadline. Acquest's offer was late and should have been rejected.

As with the CICA provision, the GSA's interpretation of GSAR § 552.270-3(a), and affirmance by the Second Circuit, also renders meaningless the FAR requirements and permits an unlawful and unfair result.

Additionally, as articulated by the court in *Aerolease*, GSAR § 552.270-3(a) is inherently unfair, violates the bona fides of the federal procurement system, as well as the spirit and intent of CICA that the federal procurement system employ full and open competition. GSA's interpretation of its regulation is unfair and creates a situation wherein bidders who comply with the time restrictions of the SFO must keep their bids open for an indeterminate period of time when no similar obligation is imposed upon late bidders. By accepting late bids, which of necessity must undergo extensive review and analysis, the time that complying bids must remain open is likely to be extended even more. Naturally, the offered premises cannot be marketed while held open for GSA. Moreover, the costs of keeping a large block of commercial office space off the market from the date of initial offering to the GSA are comparable and fair, only if the due date for initial submissions is enforced. In this case for instance, offerors who complied with the SFO submission deadline were penalized by a negotiation process that was extended from six to eleven months to accommodate the late bid of Acquest.

The federal procurement system for acquisition of leasehold interests relies on a negotiation process conducted between the dates of initial offer and BAFO. Negotiations between the GSA and each offeror can only be equitable when the GSA is apprised of the full range of offerors from the outset and can accordingly establish consistent negotiation parameters. When, as in this case, negotiations are sequential rather than parallel, the late bidder profits from the costly and time-consuming negotiation of critical issues which have preceded its involvement.

It was originally contemplated that BAFO would be some time before August 3, 1992, the date through which the SFO required offers to be held open. Having been informed in mid-July 1992 that Acquest was going to submit a bid, and after receiving Acquest's offer on August 10, 1992, GSA set a BAFO date of November 18, 1992.

According to the GSA, as adopted by the court below, extending the deadline for receipt of initial offers fosters competition by increasing the number of potential bidders who may submit proposals. This interpretation is naive and unsubstantiated. On the contrary, the inequity of considering late bids frustrates congressional intent and chills the motivation of participants to deal with the government. According to the court in *Aerolease*, "To permit consideration of such proposals would be unfair to those offerors who submitted timely initial proposals and were found to be in the competitive range." *Aerolease, supra* at 368.

Congress determined that fair, open and equal treatment of all bidders in the context of competitive procurement will best serve the interest of the public and government. In the absence of fair play, there is little incentive to deal with the government, thereby discouraging potential bidders from submitting proposals. As determined by the court in *Aerolease*, GSAR § 552.270-3(a) should be invalidated as contrary to law, regulation and because it is inherently unfair.

## CONCLUSION

The decision below upholding GSA's reliance upon and interpretation of GSAR § 552.270-3(a) conflicts with CICA, 41 U.S.C. § 253a(b)(2)(B)(ii), FAR § 15.412 and it is unfair. The issue of this conflict is important and presents questions unanswered by this Court. The questions are important because of the effects upon the integrity of the federal procurement process and the related effects upon the willingness of vendors to participate in that process. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED FEBRUARY 1, 1995**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 205—August Term, 1994

(Argued: September 7, 1994 Decided: February 1, 1995)

Docket No. 94-6043

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60 KEY CENTRE INC.,

*Plaintiff-Appellant,*

—v.—

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION (GSA); ACQUEST HOLDING, INC.,

*Defendants-Appellees.*

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Before:

MESKILL, MAHONEY, and WALKER,

*Circuit Judges.*

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Plaintiff-appellant 60 Key Centre Inc. appeals from a judgment entered February 3, 1994 in the United States District Court for the Western District of New York,

*Appendix A*

Michael B. Mukasey, *Judge*, that denied plaintiff-appellant's application for injunctive and declaratory relief with respect to the award of a lease for office space in Buffalo, New York to a competing bidder.

Affirmed.

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DONALD G. MCGRATH, Buffalo, New York (Stephen F. Szymoniak, Falk & Siemer, Buffalo, New York, of counsel), *for Plaintiff-Appellant.*

DAVID E. SIPIORA, Assistant United States Attorney for the Southern District of New York, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, Ping C. Moy, Assistant United States Attorney for the Southern District of New York, New York, New York, of counsel), *for Defendant-Appellee Administrator of General Services Administration.*

VICTOR C. SILVERSTEIN, Buffalo, New York (Lippes, Silverstein, Mathias & Wexler, Buffalo, New York, of counsel), *for Defendant-Appellee Acquest Holding, Inc.*

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*Appendix A*

MAHONEY, *Circuit Judge*:

Plaintiff-appellant 60 Key Centre Inc. ("60 Key") appeals from a judgment entered February 3, 1994 in the United States District Court for the Western District of New York, Michael B. Mukasey, *Judge*,[1] that denied 60 Key's application for: (1) an injunction barring defendant-appellee Administrator of the General Services Administration (the "GSA") from proceeding with performance of an award of a lease for space (to be occupied by the offices of the United States Attorney for the Western District of New York) to defendant-appellee Acquest Holding, Inc. ("Acquest"); and (2) for a declaratory judgment directing the GSA to award the lease to 60 Key. *See 60 Key Centre Inc. v. Administrator of General Servs. Admin.*, No. 93 Civ. 0154A (MBM), 1994 WL 25842 (W.D.N.Y. Jan. 25, 1994) (opinion supporting judgment).

We affirm the judgment of the district court.

## Background

Until December 1993, the offices of the United States Attorney for the Western District of New York (the "U.S. Attorney") were located in the United States Courthouse at 68 Court Street, Buffalo, New York. In 1990, an

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[1] The Hon. Michael B. Mukasey of the United States District Court for the Southern District of New York, sitting by designation. Because this case impacted upon the United States Courthouse for the Western District of New York, the judges in that district recused themselves from this litigation. Judge Mukasey was designated to hear the case pursuant to 28 U.S.C. § 292(b).

extensive renovation and expansion project for the Courthouse was commenced, requiring that the U.S. Attorney vacate the premises by December 15, 1993. Consequently, the U.S. Attorney was required to find and lease new office space. The GSA, through its realty specialist Paul O'Brien, solicited bids.

O'Brien prepared a solicitation for offers ("SFO") that provided the specifications and other relevant information for a ten-year lease with two five-year renewal options (the "Lease"), and specified a deadline of February 26, 1992 for initial bids. The SFO required that bids remain open until August 3, 1992, but did not provide a deadline date for Best and Final Offers ("BAFOs"). 60 Key submitted its initial bid on February 25, 1992, but Acquest did not submit its initial bid until August 10, 1992, more than five months after the deadline for initial bids.

After receiving Acquest's bid, the GSA set the BAFO deadline as November 18, 1992; both 60 Key and Acquest submitted their BAFOs before the deadline. The GSA considered Acquest's bid even though it was submitted after the deadline for initial bids stated in the SFO, because General Services Administration Regulation ("GSAR") § 552.270-3(a), 48 C.F.R. § 552.270-3(a), bars (with certain exceptions) the consideration only of offers received after the BAFO deadline. 60 Key, Acquest, and an entity called Court Tower were selected as the finalists in the bid competition.

The GSA relied on the five "Award Factor Criteria" listed in the SFO (security, quality, location, space layout, and delivery), as well as price, to assess the com-

peting bids. 60 Key scored seventeen (out of 100) points lower than Acquest, and nineteen points lower than Court Tower, on the qualitative criteria. In addition, 60 Key's overall price for the initial and renewal terms of the leasehold was higher than the price in either Acquest's or Court Tower's bid.

On January 22, 1993, GSA awarded the Lease to Acquest. JA 819. On January 29, 1993, 60 Key filed a bid protest with the General Accounting Office (the "GAO") pursuant to the procurement protest system established by 31 U.S.C. §§ 3551-3556, but the GSA determined, pursuant to 31 U.S.C. § 3553(d)(2), that Acquest should be permitted to continue its performance.[2] On February 23, 1993, 60 Key commenced the

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[2] Section 3553(d) provides:

(1) If a Federal agency receives notice of a protest under this section after the contract has been awarded but within 10 days of the date of the contract award, the Federal agency (except as provided under paragraph (2) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

(2) The head of the procuring activity responsible for award of a contract may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

(A) upon a written finding—

(i) that performance of the contract is in the best interests of the United States; or

(ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

(B) after the Comptroller General is notified of that finding.

instant action, alleging that the award of the lease violated applicable federal laws and regulations and the SFO, and seeking (1) temporary and permanent injunctive relief prohibiting the GSA and Acquest from proceeding with the award of the Lease, and (2) a declaratory judgment directing the GSA to award the Lease to 60 Key.[3]

60 Key waited until June 3, 1993, however, to move for a preliminary injunction, and did not file a supporting memorandum until October 15, 1993. *60 Key Centre*, 1994 WL 25842 at *2. At 60 Key's suggestion, made during the oral argument of that motion on December 22, 1993, the district court combined the hearing of that motion with the trial on the merits. *Id.* The parties thereafter stipulated to the documents and deposition testimony which, together with the transcript of the December 22 hearing, constitute the record in this case. *Id.* By December 22, 1993, Acquest had completed construction of the project, and the GSA had preliminarily accepted the office space. By the time the district court's opinion was issued on January 25, 1994, the U.S. Attorney had moved into the new premises.

The district court's comprehensive and thoughtful opinion considered and rejected 60 Key's claims that the GSA had violated federal law, federal regulations, and the SFO in awarding the Lease to Acquest, *see id.* at *3-

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[3] The complaint also alleged in a separate count that the GAO had acted arbitrarily, capriciously, and unlawfully by declining to make an expedited resolution of 60 Key's protest, but no relief was sought against the GAO, and the claim against the GAO was subsequently dismissed by stipulation.

10, and we affirm substantially for the reasons stated in the opinion of the district court. We address only 60 Key's challenge to the timeliness of Acquest's bid.

The district court rejected that challenge, stating:

> Plaintiff contends also that the Acquest bid was late and should never have been considered. Initial offers were due February 26, 1992. Acquest's initial offer was not received until mid-August 1992. However, GSA regulations governing evaluation of BAFO's and the award of contracts are interpreted by GSA to permit evaluation of offers received after the deadline for initial offers, provided that BAFO's are timely. . . . In particular, 48 CFR § 552.270-3(a) contains th[e] following introductory language: "Any offer received at the office designated in the solicitation after the exact time specified for receipt of best and final offers will not be considered unless. . . ." The regulation then goes on to specify the requirement for a postmark consistent with the timely mailing, and the like. However, the regulation makes it plain that the critical date is the deadline for BAFO's. Nor is this surprising. The point of the bidding process, after all, is to assure that the government can get the best deal. It would be pointless to shut out a potentially successful bidder at the beginning of the process when discussions are ongoing and the time for BAFO's has not yet passed. Here, the deadline for BAFO's was November 18, 1992. Plaintiff does not dispute GSA's claim that Acquest's BAFO was received on November 17, 1992. Thus, 60 Key's objection to the timing of Acquest's bid is without merit.

1994 WL 25842 at *5 (alterations partially added).

This appeal followed. During the pendency of this appeal, 60 Key called to our attention the decision, rendered after the district court's decision in this case, of the United States Court of Federal Claims in *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342 (1994), *aff'd*, 39 F.3d 1198 (Fed. Cir. 1994) (table). In *Aerolease*, the United States Court of Federal Claims ruled that GSAR § 552.270-3(a) invalidly permits the acceptance of proposals submitted after the deadline for initial proposals but before the deadline for BAFOs.[4] The Court of Federal Claims concluded that as construed to permit this result, § 552.270.3(a) conflicts with several federal statutes and regulations and is unfair. *See id.* at 365-68; *see also id.* at 375-79 (denying reconsideration).

We solicited letter briefs from the parties addressing (1) the correctness of the ruling in *Aerolease*, and (2) the proper disposition of this appeal if that ruling is correct. We conclude, contrary to *Aerolease*, that § 552.270-3(a) validly permits the submission of bids after the deadline for initial bids but prior to the deadline for BAFOs. We write only to explicate that conclusion.

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[4] The validity of GSAR § 552.270-3(a) was not raised as an issue on the appeal to the Court of Appeals for the Federal Circuit in *Aerolease*, apparently because the party against whom the ruling on § 552.270-3(a) was directed did not participate in the appeal. The validity of § 552.270-3(a) was not at issue before the district court in this case, and was not addressed in the parties' briefs to this court, which were filed prior to our receipt of 60 Key's letter pursuant to Fed. R. App. P. 28(j) that alerted this court to the *Aerolease* decision.

*Appendix A*

Discussion

It is well settled that an agency's interpretation of its own regulations is " 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *see also Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994); *Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Ali v. Reno*, 22 F.3d 442, 446 (2d Cir. 1994). When, however, a regulation "operates to create a rule out of harmony" with the statute under which it is promulgated, the regulation is considered a "nullity." *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *see also Larionoff*, 431 U.S. at 873 n.12.

The Court of Federal Claims concluded in *Aerolease* that GSAR § 552.270-3(a), as construed by the GSA, (1) conflicts with: 41 U.S.C. § 253a(b)(2)(B)(ii), a provision of the Competition in Contracting Act of 1984 ("CICA"), Pub. L. No. 98-369, Divison B, Title VII, 98 Stat. 1175 (1984); GSAR § 570.203(a)(4), 48 C.F.R. § 570.203(a)(4); and Federal Acquisition Regulation ("FAR") § 15.412, and (2) operates unfairly with respect to bidders for government contracts. *See Aerolease*, 31 Fed. Cl. at 365-68; *see also id.* at 375-79 (denying reconsideration). We proceed to address these issues.

*Appendix A*

A. *The GSA's Interpretation of GSAR § 552.270-3(a).*

GSAR § 552.270-3(a) provides in pertinent part:

> Any offer received at the office designated in the solicitation after the exact time specified for receipt of best and final offers will not be considered unless it is received before award is made and it [satisfies specified mailing requirements or is the only offer received].

48 C.F.R. § 552.270-3(a).

The GSA maintains that it has consistently interpreted and applied GSAR § 552.270-3(a) to allow for the consideration of bids received before the deadline for BAFOs. Thus, according to the deposition testimony of a GSA contracting officer, the date for the submission of initial bids stated in an SFO is "a date by which [the GSA is] looking to get . . . expressions of interest," but the GSA "accept[s] offers up until close of best and final offers as a matter of policy." *See GBA Assocs. v. United States, Gen. Servs. Admin.*, No. C.A. 93-1442-A, slip op. at 13 (reasonable and acceptable for GSA to construe GSAR § 552.270-3 to permit consideration of offers received before BAFO deadline).

B. *Asserted Conflict with 41 U.S.C. § 253a(b)(2)(B)(ii).*

41 U.S.C. § 253a(b)(2)(B)(ii) provides in pertinent part that: "[E]ach solicitation for . . . competitive proposals . . . shall at a minimum include—. . . the time and place for submission of proposals." 60 Key asserts, in its letter brief regarding this issue, that the specifi-

cation of an initial due date *and* a bar of any subsequent offers is mandated by the quoted provision.[5] The statute's language does not require this reading, however, because Section 253a(b)(2)(B)(ii) provides only that a time and place for bid submission must be stated in the SFO, and does not assert any penalty for bid submissions after this date. It cannot be disputed that the GSA included a time for submission of offers in the SFO, thus complying with the literal requirement of § 253a(b)(2)(B)(ii).

Further, the legislative history of CICA establishes that a predominant purpose of its enactment was to augment competition. As stated in *Abel Converting, Inc. v. United States*, 679 F. Supp. 1133 (D.D.C. 1988):

> Following a careful review of federal government procurement procedures, Congress determined that at the time a majority of such procurement was achieved by noncompetitive procedures to the detriment of the government. S. Rep. No. 98-50, 98th Cong., 1st Sess. 7 (1984) [hereinafter "Senate Report"]. To correct this imbalance, Congress enacted CICA, Pub. L. No. 98-369, Division B, Title VII, 98 Stat. 1175 (1984), and established a statutory preference for the use of competitive procedures. Senate Report at 1.

679 F. Supp. at 1138.

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[5] 60 Key also invokes 42 U.S.C. § 253b(a), which states that: "An executive agency shall evaluate . . . competitive proposals based solely on the factors specified in the solicitation." The claim is that the specified initial due date is one of these "factors." This is a transparently implausible reading of § 253b(a).

In furtherance of this goal, 41 U.S.C. § 414(1) specifies that:

> To further achieve effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices—
>
> > (1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured[.]

The GSA's policy of allowing bids to be submitted up to the BAFO deadline effectively enhances competition, as occurred in this case. Thus, we perceive no conflict between GSAR § 552.270-3 and either the literal requirements of 41 U.S.C. § 253a(b)(2)(B)(ii) or the underlying policy of CICA to enhance competition.

C. *Asserted Conflict with GSAR § 570.203(a)(4).*

Section 570.203(a)(4) simply reiterates the mandate of 41 U.S.C. § 253a(b)(2)(B)(ii), requiring that SFO's "[s]pecify a date and place for the submission of offers." For the reasons already stated, we perceive no conflict between GSAR §§ 552.270-3(a) and 570.203(a)(4).

D. *Asserted Conflict with FAR § 15.412.*

Section 15.412 states in pertinent part:

> (b) Offerors are responsible for submitting offers, and any modifications to them, so as to reach the Government office designated in the solicitation on time. . . .
>
> (c) Proposals, and modifications to them, that are received in the designated Government office after the exact time specified are *late* and shall be considered only if (1) they are received before award is made, and (2) the circumstances, including acceptable evidence of date of mailing or receipt at the Government installation, meet the specific requirements of the provision at 52.215-10, Late Submissions, Modifications, and Withdrawals of Proposals.

48 C.F.R. § 15.412(b), (c).

Plainly, this provision spells out the *consequences* of a late submission, but does not mandate any particular action by the GSA with respect to setting the deadlines to which those consequences will attach. Moreover, the provision does not define what constitutes a late submission, and therefore does not contradict the GSA's policy of acepting proposals before the deadlines for BAFOs.

E. *Fairness Concerns.*

*Aerolease* stressed the "unfairness" of allowing a late bidder to compete with bidders who met the initial deadline for submission of bids, and undertook to keep their

bids open during a period when the late bidder assumed no similar obligation. *See* 31 Fed. Cl. at 365-68; *see also id.* at 378 (denying reconsideration). All of the initial bidders in this case were or should have been aware, however, of the GSA's policy to allow late bids until the BAFO deadline. Further, parties like 60 Key who submit bids by the initial date specified in the SFO have the competitive advantage of additional time to negotiate an acceptable bid by the BAFO deadline. In any event, the statutes and regulations that govern federal procurement policies "are not designed to establish private 'entitlements' to public business, but rather to produce the best possible contracts for the government in the majority of cases." *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 206 (D.C. Cir. 1984).

In sum, we perceive no innate unfairness in a procurement system that encourages early submission of proposals, but does not deprive the government or the public of the benefit of later, more advantageous offers.

## Conclusion

The judgment of the district court is affirmed.

## APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED FEBRUARY 1, 1995

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of February, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE THOMAS J. MESKILL,
HONORABLE J. DANIEL MAHONEY,
HONORABLE JOHN M. WALKER,
Circuit Judges.

94-6043

60 KEY CENTRE INC.,
Plaintiff-Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION (GSA); ACQUEST HOLDING, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

*Appendix B*

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of the District Court is affirmed in accordance with the opinion of this Court.

A TRUE COPY

GEORGE LANGE III, Clerk

By:
s/ Edward J. Guardaro
Edward J. Guardaro,
Administrative Attorney

ISSUED AS MANDATE: 21 March 95

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED FEBRUARY 3, 1994

UNITED STATES DISTRICT COURT
Western District of New York

CASE NUMBER: 93-CV-154

60 KEY CENTRE, INC.,

v.

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION
ACQUEST HOLDING, INC.

JUDGMENT IN A CIVIL CASE

* * *

**Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's injunction and declaration are denied and the complaint is dismissed.

February 3, 1994
*Date*

RODNEY C. EARLY
*Clerk*

s/ Irene J. Tomasulo
(By) Deputy Clerk

**APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK DATED JANUARY 25, 1994**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

93 Civ. 0154A (MBM)

60 KEY CENTRE, INC.

Plaintiff,

-against-

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION, COMPTROLLER GENERAL OF THE UNITED STATES AS HEAD OF GENERAL ACCOUNTING OFFICE, and ACQUEST HOLDINGS, INC.,

Defendants.

OPINION AND ORDER

APPEARANCES:

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*Appendix D*

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MICHAEL B. MUKASEY, U.S.D.J.

In this action challenging the award of a lease for office space to be occupied by the United States Attorney's Office for the Western District of New York in Buffalo, plaintiff 60 Key Centre seeks a permanent injunction and a declaration that it should be the successful bidder. For the reasons set forth below, both the injunction and the declaration are denied and the complaint is dismissed.

I.

The lease in question was necessitated by a project, begun in 1990, to expand and improve the Court House occupied by the United States District Court for the Western District of New York in Buffalo, and the consequent need to relocate the office of the United States Attorney for that District from that building.[1] (Waldron Dec. ¶¶ 2-4) Realty Specialist Paul O'Brien of the General Services Administration ("GSA"), working with his colleagues and supervisors, prepared a 69-page solicitation for offers ("SFO") containing the specifications for the space to house the

1. As a result, all the judges of the Western District of New York had to recuse themselves because the outcome of this case conceivably could affect the facilities they occupy. On February 25, 1993, the undersigned was designated to hear the case pursuant to 28 U.S.C. § 292(b).

United States Attorney's Office and directing that proposed lessors of such space respond by February 26, 1992. (Compl't Ex. B) He then advertised the government's need for space, provided copies of the SFO to interested parties, reviewed the initial bids and negotiated with the bidders the terms of their various offers, all in accordance with usual GSA procedure. Thereafter, also in accordance with such procedure, he directed that bidders present what is referred to as their best and final offers ("BAFO's") by November 18, 1992. (O'Brien 11/93 Dec. ¶6)

He and his colleagues at GSA then reviewed the BAFO's using five equally weighted Award Factor Criteria, described in the SFO, each factor worth a maximum of 20 points: security, quality, location, space layout and delivery. Price was evaluated separately. (*Id.* at ¶¶ 7, 13) The result of applying the Award Factor Criteria, set forth in tabular form below, was that Acquest and another bidder, Court Tower, were rated within two points of one another and were considered comparable, and plaintiff was rated 17 points lower. Acquest was selected because its price per square foot was found lower than Court Tower's. (*Id.* at ¶25) The following was the result of comparing the award factor scores of the three relevant bidders:

| FACTOR | ACQUEST | COURT TOWER | 60 KEY |
|---|---|---|---|
| Security | 20/20 | 14/20 | 12/20 |
| Quality | 18/20 | 15/20 | 15/20 |
| Location | 8/20 | 20/20 | 1/20 |
| Space Layout | 15/20 | 14/20 | 16/20 |
| Delivery | 1/20 | 1/20 | 1/20 |
| TOTALS | 62 | 64 | 45 |

(*Id.*)

*Appendix D*

The evaluation of price was based on both the initial and renewal periods of the proposed lease — 10 years plus two five-year renewal periods, for a total of 20 years (O'Brien 11/93 Dec. ¶ 18), as required by the SFO, which provided that offers would be evaluated "on the basis of the annual price per square foot, including any option periods." (Complt. Ex. B § 1.9) GSA calculated the price to include both the rent per square foot and the estimated cost of utilities, and found the offers of both Acquest and Court Tower cheaper than the offer submitted by 60 Key. (O'Brien 11/93 Dec. ¶ 18)

Plaintiff's structure was already built at the time the bids were submitted; Acquest's was not. Since then, Acquest has built its six-story structure and the space in question either is ready to be occupied by the United States Attorney's Office or is so occupied.

60 Key's bid was found to be the third most desirable bid among the three final bids considered. The lease in question was awarded by defendant Administrator of GSA on January 22, 1993 to defendant Acquest Holdings, Inc. The lease covers 50,000 square feet of office space in downtown Buffalo, New York.

Plaintiff issued a protest within 10 days, but the agency determined on February 4, 1993, as permitted by 31 U.S.C. § 3553(d)(2), that the best interests of the United States permitted continuation of Acquest's performance. Plaintiff filed this action on February 23, 1993, about a month after the award. Plaintiff also sued the Comptroller General of the United States as head of the General Accounting Office ("GAO") for failure to decide plaintiff's bid protest on an expedited basis. That claim has been withdrawn. Plaintiff did not move for a preliminary injunction until June 3, 1993, and did not submit a memorandum in support of its motion until October 15, 1993.

*Appendix D*

During oral argument on December 22, 1993, plaintiff suggested for the first time that the preliminary injunction hearing should be combined with the trial on the merits. The parties agreed thereafter on the documents and deposition testimony which, together with the transcript of the December 22 hearing itself, constitute the record in this case.

60 Key's complaint purports to state four claims for relief, denominated "counts." The first count lists some 13 respects in which Acquest's bid was either improper or not as advantageous to the government as 60 Key's. The second count suggests that GSA violated 31 U.S.C. § 3553(d)(1) and (2), which requires a federal agency to direct cessation in performance of a contract when a protest is received within 10 days of the award, subject to a determination that continued performance is in the best interests of the United States, and that issuance of such a determination in this case was arbitrary and capricious, apparently for the reasons stated in the first count. The third count claims that GSA's policy permitting consideration of a bid with respect to property on the border of the zone delineated in the SFO was not published in the Federal Register, in violation of 5 U.S.C. § 552(a)(1), which requires that agencies publish their substantive rules of general applicability. The fourth count is directed against the GAO, and has been withdrawn. Although the complaint makes the usual residual demand for any relief the court may deem appropriate, the only forms of relief explicitly requested are an injunction barring performance and a declaration that 60 Key should prevail.

As set forth more fully below, the principal focus of the proceeding has been on the first count, alleging irregularities in the bid award process, and it is in any event the only count of substance. However, the facts plaintiff has advanced to challenge

the bid award process are merely disparate alleged deviations, many of which are simply inconsequential and some of which constitute no deviation at all. Although at the outset plaintiff assigned no particular order of priority to its challenges, plaintiff on December 22 pressed the claim that the principal deviation was the failure by the winning bidder, Acquest, to submit sufficiently detailed plans and drawings to permit GSA to decide whether Acquest's bid conformed to GSA's Solicitation for Offers ("SFO"). (12/22/93 Tr. 40) However, in its final submission, 60 Key has blended its previous positions, concentrating on the alleged inadequacies in Acquest's drawings, but continuing to advance many other widely scattered arguments. Therefore, this opinion must treat not only the alleged inadequacy of Acquest's drawings, but also several of the other alleged shortcomings in the choice of Acquest as the lessor.

As set forth in Section III below, even a showing by 60 Key that GSA deviated from the standards of the SFO or of applicable law would not warrant an injunction unless the deviation involved a "clear and prejudicial violation of applicable statutes or regulations," *Kentron Hawaii. Ltd. v. Warner,* 480 F.2d 1166, 1169 (D.C. Cir. 1973), or that as to a matter committed to GSA's discretion the agency acted without rational basis. *Princeton Combustion Research Lab. v. McCarthy,* 674 F.2d 1016, 1921 (3d Cir. 1982) That evaluation must be made with deference to GSA's interpretation of its own regulations and procedures, unless that interpretation is plainly inconsistent with applicable language, *Udall v. Tallman,* 380 U.S. 1, 16 (1965), and with due awareness as well that courts "are ill-equipped to settle the delicate questions involved in procurement decisions." *Elcon Enters. v. Washington Metro. Area Transit Auth.,* 977 F.2d 1472, 1478 (D.C. Cir. 1992).

*Appendix D*

II.

1. *Acquest's Drawings*

The objection 60 Key advanced to the front rank at the December 22 hearing appeared initially as the ninth in a series of 11 objections contained in its motion for a preliminary injunction — that the drawings submitted by Acquest were inadequate to serve as the basis for a reasonable choice by GSA. (Schlaepfer 5/93 Aff. ¶¶ 71-76) Plaintiff has now extrapolated this objection into an argument that this failure made it impossible for GSA to determine the usable floor area of the space offered by Acquest, to allow preparation of documents necessary to meet a delivery schedule, to determine compliance with energy use requirements imposed by executive order, and to permit timely preparation of floor plans by the tenant. (Pl. Supp. Mem. p.4, ¶ 3) In particular, plaintiff has argued that the inability to assess Acquest's compliance with energy use requirements has resulted in Acquest's delivery of a building that does not have an economizer cycle on its heating, ventilating and air conditioning ("HVAC") system, and therefore is not in compliance with those requirements.

In part, plaintiff's argument here resulted initially from a misapprehension of when drawings were required to be submitted, and which drawings were submitted at what time. Although § 1.7 of the SFO required that "blue line plans of the space offered" be submitted, it was permissible to submit such plans at any time before the deadline for BAFO's, November 18, 1992. Apparently, Acquest submitted two sets of drawings in August 1992, one of which was identical to drawings submitted in December 1992. (O'Brien 11/93 Dec. ¶ 17) This appears to have led plaintiff to conclude that Acquest submitted changed

drawings after the deadline. However, plaintiff has not shown that the December 1992 drawings were different from at least one set of the August 1992 drawings.

Beyond the issue of the timing of drawings, plaintiff, through its expert architect Robert G. Shibley, has challenged the sufficiency of Acquest's drawings, principally in a report attached to his affidavit of July 22, 1993. (Shibley 7/93 Aff. Ex. B) Shibley attacks the drawings for being incomplete, implicitly in violation of the SFO, and for not showing such features as the height of ceilings, the correct number of steps between floors, the location in the core where HVAC systems such as air shafts or utility lines would be located, and the like. Plaintiff has contended that in part as a result of these inadequacies, which did not enable GSA to make a rational choice, Acquest has been permitted to deliver a building without an economizer cycle on its HVAC system, in violation of an applicable executive order.

The government's response, which I find entirely credible, is that the drawings were detailed enough to permit a determination of how much usable space Acquest was going to deliver, and that to the extent detail was missing that omission was intentional, so as to permit the ultimate occupant of the space, the United States Attorney's Office, to determine the precise size and location of offices. (O'Brien 12/93 Dec. ¶ 9) To the extent there is a dispute as to whether the HVAC system includes an economizer cycle, both Acquest's BAFO and the lease between GSA and Acquest require such a cycle. If the space as delivered does not include such a feature, that is a violation of the lease for which the government presumably may seek redress, through rent reductions or otherwise. However, a defect in performance, if such exists, does not affect the rationality of GSA's choice before any allegedly defective performance.

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As to the height of ceilings, I do not understand 60 Key to challenge the actual height of the ceilings in the completed building, but only the sufficiency of the plans to portray such height. The SFO, in § 5.12, calls for nine-foot ceilings. It is not necessary in order for GSA to make a rational choice that plans portray a feature clearly called for in the SFO and one that does not distinguish one bidder's premises from another's, or such irrelevant details as the precise number of steps between one floor and another.

The alleged shortcomings in Acquest's portrayal of the offered space are contrasted with Shibley's view of the advantages of plaintiff's space, a view that at times misapprehends the needs of the proposed lessee. Thus, Shibley argues that 60 Key's space is preferable because it "is organized around a central core which accommodates elevators, bathrooms, storage rooms and mechanical spaces.... In contrast, the Acquest building offers a very deep space which . . . will remove many offices and other rooms from even the remotest contact with natural exterior light." (Shibley 7/93 Aff. Ex. B pp. 3-4)

However, as GSA points out, the United States Attorney requires such spaces as a library, an evidence vault and a secured storage room that are most efficiently located in the interior of an office unless valuable window space is to be wasted. (O'Brien 12/93 Dec. ¶ 17)

Shibley has also misconstrued as a disadvantage the placement of columns in the Acquest drawings. (Shibley 7/93 Aff. Ex. B p. 4) Such columns are placed so as to permit recessed space in the corridors for filing cabinets accessible to lawyers in each office, because the United States Attorney's Office does not use a central filing system; rather, each Assistant U.S. Attorney

keeps his or her own files, which are most conveniently located near the Assistant's office. (O'Brien 12/93 Dec. ¶ 19)

Plaintiff argues that in part because the drawings were inadequate, GSA could not properly evaluate whether Acquest was able to deliver the rented space within 180 days, the time required by § 1.6 of the SFO. However, the 180 days is measured, according to the SFO, from the date of the lease award or the date of the tenant's delivery of floor plans to Acquest, whichever is later. Although the lease gave GSA 60 days to deliver the floor plans, it took 90, which meant that Acquest had 270 days, or approximately until the last week in October 1993, to deliver the space. Acquest in fact has taken about 90 days longer, and will have delivered the space by mid-January 1994. Although GSA has conceded that it viewed Acquest's commitment to deliver the space within the required 180 days as "ambitious," (O'Brien 11/93 Dec. p. 10) plaintiff offers no evidence that the drawings Acquest submitted could not be relied upon to make that judgment or to determine that the risk of a serious delay was sufficiently remote to warrant going ahead. In particular, the opinion of plaintiff's expert appears to be that Acquest's commitment to deliver the space within 180 days could not have been made in good faith because Acquest entered into a construction contract calling for a construction schedule of 240 days. (Shibley 7/93 Aff. Ex. B pp. 7-8) However, as noted above, such a schedule would have been entirely consistent with GSA's delivery of floor plans 60 days after the award and an additional 180 days, or a total of 240 days, for completion.

Moreover, as GSA notes, the lease could be terminated or liquidated damages could be assessed under the lease in the event of a delay. (O'Brien 11/93 Dec. ¶ 13 pp. 10-11)

*Appendix D*

Finally, at least with respect to the drawings, as Shibley concedes, it is apparent from Acquest's drawings that the offered space is on three floors, which is more efficient and desirable than 60 Key's proposal for space on four floors.

In sum, 60 Key's claim that the Acquest drawings did not afford a rational basis for weighing Acquest's bid against 60 Key's is not supported by persuasive evidence.

2. *Location of Acquest Building*

Plaintiff's claim that the Acquest site is outside the geographic area specified in the SFO is the subject principally of the third count in the complaint, discussed in section IV below. In addition, plaintiff has claimed that the Acquest site is not in a prime commercial office area, as required by the SFO, and that the transportation and other amenities near 60 Key's-site are preferable to those near the Acquest site.

The dispute between 60 Key and GSA about the amenities available to the tenants of the respective buildings (*compare* Shibley 7/93 Aff. Ex. B pp. 6-7 *with* Acquest 12/29/93 Response pp. 2-4), amounts to a dispute involving taste and opinion. As set forth below, it is not the function of a court in a proceeding such as this to substitute its tastes and opinions for those of the agency charged with the decision at issue.

3. *Timing of the Acquest Bid*

Plaintiff contends also that the Acquest bid was late and should never have been considered. Initial offers were due February 26, 1992. Acquest's initial offer was not received until mid-August 1992. However, GSA regulations governing

evaluation of BAFO's and the award of contracts are interpreted by GSA to permit evaluation of offers received after the deadline for initial offers, provided that BAFO's are timely. (O'Brien 11/93 Dec. ¶ 9) In particular, 48 CFR § 552.270-3(a) contains that following introductory language: "Any offer received at the office designated in the solicitation after the exact time specified for receipt of best and final offers will not be considered unless . . . ." The regulation then goes on to specify the requirement for a postmark consistent with timely mailing, and the like. However, the regulation makes it plain that the critical date is the deadline for BAFO's. Nor is this surprising. The point of the bidding process, after all, is to assure that the government can get the best deal. It would be pointless to shut out a potentially successful bidder at the beginning of the process when discussions are ongoing and the time for BAFO's has not yet passed. Here, the deadline for BAFO's was November 18, 1992. Plaintiff does not dispute GSA's claim that Acquest's BAFO was received on November 17, 1992. Thus, 60 Key's objection to the timing of Acquest's bid is without merit.

4. *Acquest Failure to Obtain Zoning Approvals in Advance*

Plaintiff notes that the only approval Acquest had obtained at the time it was awarded the lease was a letter in the most general terms from the Buffalo zoning authorities that they had no objection to construction of the proposed building. (Pltf. Reply Ex. F) This letter (the "Krug letter") does not purport to grant variances, which apparently were obtained at a later date. Although GSA argued initially that the Krug letter was all the approval that could have been obtained before the building was constructed, Acquest has conceded that variances could have been obtained earlier but has argued that the Buffalo Department of Public Works was backlogged and could not issue the required

documentation in time. However, the issue here is whether it was rational for GSA to consider Acquest's offer on the assumption that the required variances could be obtained, as they in fact were. Plaintiff does not suggest that there was anything so extraordinary about the variances in question as to have made it irrational for GSA to believe they could be obtained.

5. *Other Objections*

Plaintiff has contended that the record discloses impermissible post-award negotiations, in part because Acquest changed the source of its financing, its general contractor and its architect after the award. However, plaintiff points to no provision in the SFO requiring that the source of financing be unconditional at the time of the award or barring any change in the source of financing, the general contractor or the architect. In any event, post-award issues are not relevant to 60 Key's challenge because the issue is whether GSA's decision was rational based on information it had before the award.

Further, plaintiff argues that its challenges to the suitability of the Acquest bid are based on the testimony of an architect, Robert Shibley, whose professional credentials far exceed those of the GSA decision-makers, Paul O'Brien and his superiors. So they do, but as set forth below, even if a court were inclined to reach a result different from the one reached by the agency, the court should stay its hand "unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision." *Sea-Land Serv., Inc. v. Brown,* 600 F.2d 429, 434 (3d Cir. 1979). That decision-makers may bear less weighty credentials than those who challenge their decisions does not mean that the decisions themselves are irrational.

*Appendix D*

6. *Current Status of 60 Key's Property*

To the extent 60 Key seeks a declaration that it should be awarded the lease for the space it offered in its BAFO, such a declaration apparently is not possible because, as GSA notes, part of the space 60 Key initially offered has been occupied by another tenant. (Huntress Aff. ¶ 18) 60 Key appears to acknowledge at least tacitly that it no longer has available the space it first offered; it states in its Supplemental Memorandum simply that "60 Key has existing vacant space that can be made ready for occupancy expeditiously," not that it has available the space it offered earlier. At one point 60 Key had sought to amend its BAFO after the deadline by offering space in a different tower, an amendment GSA rejected as a material change in the BFO and which was subsequently withdrawn. (O'Brien 11/93 Dec. ¶ 26) If the currently available space is the same as that previously rejected, 60 Key has advanced no reason to justify overriding GSA's prior judgment as to such space. 60 Key has made no showing that whatever space it is now offering is identical in all meaningful respects to the space it offered previously.

III.

A comprehensive statement of the legal standard that controls challenges to government procurement awards appears in *M. Steinthal & Co. v. Seamans,* 455 F.2d 1289 (D.C. Cir. 1971). The Court in *Steinthal* noted that such challenges are occasioned by losing bidders rushing into court to halt procurement and obtain rapid judicial action against a background of technical statutes, regulations, contracts and specifications. The Court then articulated two principles

> which we deem of especial importance for

> judicial consideration of emergency challenges to determinations of procurement officials:
>
> (1) courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision; and (2) even in instances where such a determination is made, there is room for sound judicial discretion, in the presence of overriding public interest considerations, to refuse to entertain declaratory or injunctive actions in a pre-procurement context.

455 F.2d at 1301. The first of these principles was found to arise from the availability of a judicial remedy to protect against illegal government action, which was found to give rise to a concomitant responsibility by courts to exercise their power with restraint lest they be "propelled without adequate preparation into a tangle of complex statutory and decisional rules." *Id.* at 1302. The second was based on the availability in the Court of Claims of damage relief in the form of bid preparation costs, and on the public interest in the expeditious completion of the bid procurement process, particularly as to items urgently needed.

Moreover, as to matters of opinion and judgment, a court may not substitute its own judgment for that of an administrative agency. *See, Citizens to Preserve Overton Park. Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

By those standards, 60 Key's challenges are plainly insufficient. None of the above decisions challenged by 60 Key

was irrational. The drawings in question allowed GSA to determine how much space was being offered and at what price, the location of the building was within the zone of convenience sought by the agency, and the other information submitted by Acquest permitted GSA to determine that that bidder could get the necessary approvals and financing and build its building in enough time to serve the convenience of the District Court and the United States Attorney's Office. Nor was there any illegality in GSA's determinations.

However, even if any of the decisions 60 Key attacks could be described as irrational, that finding in itself would not justify an injunction. Rather, it would simply require a balancing of three additional considerations pursuant to the second factor — public interest — defined in *Steinthal*. Those considerations are:

> the practical considerations of efficient procurement of supplies for continuing government operations; the public interest in avoiding excessive costs; and the bidder's entitlement to fair treatment through adherence to statutes and regulations.

*Sea-Land Serv.* 600 F.2d at 434. The first two considerations weigh heavily against an injunction granting relief to plaintiff. Although the space at issue in this case may not be as urgently needed as the parachutes at issue in *Steinthal,* it is essential that the District Court for the Western District of New York be able to occupy the space it needs in order to perform its functions, and that the United States Attorney's Office be able to move into other convenient and suitable space so as to perform its functions. Further, the cost — social and economic — of interrupting those functions by directing a change just as the United States

Attorneys Office has moved into or is about to move into the Acquest space would be substantial.

The only conceivable interest that could override the interest in promoting efficiency and minimizing cost would be the interest in avoiding illegality and unfairness. In this case, that would necessitate a showing of some serious departure from appropriate standards and regulations with resulting unfairness to plaintiff. There has been no such showing here.

To the extent plaintiff relies on *John W. Danforth Co. v. Veterans Administration*, 461 F. Supp. 1062 (W.D.N.Y. 1978), where Judge Elfvin granted injunctive relief to an unsuccessful contract bidder, that case provides no support for issuing an injunction here. In that case, Judge Elfvin found that the agency in question had acted in a precipitate and unauthorized fashion in order to moot the case before plaintiff had an opportunity to seek relief. That conduct in connection with a project — replacement of boilers in a Veterans Administration hospital — not in itself urgent, justified an injunction restarting the bidding process. *Id.* at 1073. No conduct of the kind found in *Danforth* has been proved here, and even if such conduct were present there is an urgency to the timing here that was not present in *Danforth.* Moreover, to the extent such urgency could have been avoided by quicker action, plaintiff itself bears substantial responsibility for the delay.

An alternative and independent basis for denying relief to 60 Key in connection with these claims is that 60 Key apparently has leased a portion of the space it offered in its BAFO, and has not challenged GSA's determination that a revision of the BAFO to offer other space is a material change. Accordingly, any declaration that 60 Key's space as initially offered should be

leased by GSA would be moot, and therefore beyond the jurisdiction of this court. *See Arthur v. Manch,* No. 93-7199 slip op. at 652-53 (2d Cir. Dec. 22, 1993), and cases cited therein. Absent the possibility that 60 Key could be awarded the lease in question, 60 Key lacks standing to demand that Acquest be barred from continuing to perform. *See Heldman v. Sobol,* 962 F.2d 148, 154 (2d Cir. 1992), and cases cited therein.

For the reasons set forth above, plaintiff has failed to sustain its first two claims for relief, alleging that the award of the lease to Acquest was attended by deviations from lawful procedure and was without rational basis, and that the decision to permit Acquest to continue performance was without rational basis. Accordingly, judgment for defendants will be entered as to those claims.

IV.

The third count in the complaint focuses on and challenges GSA's practice, in connection with offers to lease property, of considering locations on the boundary of the zone specified in the SFO as well as within that zone.

GSA points out that its Assignment and Utilization Handbook permits the boundaries of a proposed site to be defined by a list of street names, and specifies that "both sides of-boundary streets shall be presumed acceptable." GSA Assignment and Utilization Handbook (PBS P 7000.2A), Ch. 2-6 at 8. Plaintiff's rejoinder apparently is that this handbook rule is a rule of general applicability which GSA may not follow until it has published the rule in the Federal Register, as provided in 5 U.S.C. § 552(a)(1)(D), requiring such publication for all "substantive rules of general applicability . . . and statements of

general policy or interpretations of general applicability formulated and adopted by the agency." Plaintiff argues that the handbook rule and GSA's practice may not be used against plaintiff, and that as a result Acquest's site may not be considered.

However, even if the rule in question is within the statute, plaintiff has not been injured in any cognizable sense either by failure to publish it in the Federal Register or by applying it here. The statute applies to a rule that is " 'of such a nature that knowledge of it is needed to keep [plaintiff and those similarly situated] informed of the agency's requirements in respect to any subject within its competence.' " *Appalachian Power Co. v. Train,* 566 F.2d 451, 455 (4th Cir. 1977) (quoting *United States v. Hayes,* 325 F.2d 307, 309 (4th Cir. 1963). Plaintiff does not claim to own property on the border of a zone within which GSA proposes to rent. The only effect here of the rule in question is to permit another entity's property to be considered. Because plaintiff does not assert any prejudice to it from failure to publish the subject rule in the Federal Register, or any act it would have taken or refrained from taking had it known of such a rule, it cannot rely on such failure as the basis for seeking relief here. That is to say, 60 Key has suffered no injury known to the law from this alleged failure to publish, and therefore lacks standing to demand relief based on such failure. *Heldman,* 962 F.2d at 154.

To the extent plaintiff contends that GSA has violated the SFO by not including this rule or policy in that document, the contention lacks substance. 60 Key does not dispute that the Acquest property in fact is bounded by two of the streets listed in the SFO as comprising the boundaries within which GSA would consider renting. Again, 60 Key has not contended that it was in any way prejudiced by omission of such information from the SFO. Inasmuch as 60 Key could not have moved its own building,

there can have been no possible prejudice to 60 Key from such an omission, other than possibly a suggestion that 60 Key would not have entered the bidding process at all had it known it was competing against properties on both sides of the listed streets. 60 Key has made no such contention.

For the above reasons, plaintiff's third count is without merit and must be dismissed.

* * *

Plaintiff has failed to justify either an injunction to bar Acquest from continued performance, or a declaration that plaintiff should be regarded as the successful bidder. Because that is the only relief plaintiff has requested in connection with the trial of this case, judgment will be entered for defendants and plaintiff's complaint will be dismissed. Settle judgment on 10 days' notice.

SO ORDERED:

s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
January 25, 1994

(2)

JUN 23 1995
OFFICE OF THE CLERK

No. 94-1760

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

60 KEY CENTRE, INC.,

*Petitioner,*

vs.

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION and ACQUEST HOLDING INC.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENT ACQUEST HOLDINGS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether an award of a lease should be declared invalid and enjoined when the issue is moot and would cause substantial social and economic cost to the government?

## LIST OF PARTIES

The parties to the proceedings are:

*Petitioner:*
60 Key Centre, Inc.

*Respondents:*
Administrator of the General Services Administration and Acquest Holdings, Inc.

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No. 94-1760

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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vs.

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION and ACQUEST HOLDING INC.,

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## BRIEF OF RESPONDENT ACQUEST HOLDINGS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 47 F.3d 55. The opinion of the district court (Pet. App. 18a-37a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on February 1, 1995. The petition for a writ of

certiorari was filed on April 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT OF THE CASE

Petitioner is the unsuccessful bidder on a project to lease space to the U.S. Attorney's Office for the Western District of New York in Buffalo, New York. Although there were only three bidders, petitioner's offer to lease space was inferior to the bids of the other two bidders. (Pet. App. 4a-5a, 20a-21a, joint appendix submitted to the Court of Appeals, "JA" 372-375).

Petitioner commenced an action on February 23, 1993, seeking an injunction prohibiting respondents Administrator of General Services Administration ("GSA") and Acquest Holdings, Inc. ("Acquest") from proceeding with an award of the lease to Acquest and a declaratory judgment directing GSA to award the lease to petitioner. Petitioner waited until June 3, 1993 to move for a preliminary injunction and did not file supporting memorandum until October 15, 1993. (Pet. App. 5a-6a). The hearing in the case took place on December 22, 1993, by which time Acquest had completed construction of the project and the GSA had preliminarily accepted the office space. By the time the district court's opinion was issued on January 25, 1994, the U.S. Attorney had moved into the new premises. (Pet. App. 6a)

## REASONS FOR DENYING THE WRIT

### POINT 1

### THE ISSUE IS MOOT

Petitioner no longer had the space available that it originally offered, and, therefore, the court could not award the lease to petitioner because petitioner could no longer offer the government the space that it initially offered. In view of the foregoing, their offer of space would be moot since it was occupied by another of petitioner's tenants. (Pet. App. 31a, 34a-35a)

Even if the lower court were to have rejected the Acquest bid, the bid of petitioner was the worst of the three bids submitted and, therefore, it would not have received the award in any event, making the issue moot. (Pet. App. 4a-5a, 20a-21a, JA 372-375).

## POINT 2

## SETTING ASIDE THE AWARD WOULD BE UNFAIR AND RESULT IN CHAOS AND CONFUSION

It is submitted that the petitioner was dilatory in bringing its motion for a preliminary injunction, a period of approximately four months, and in failing to file a supporting memorandum for at least eight months, thereby allowing the construction to be completed and the U.S. Attorney to move into the space that was let. Therefore, to allow the petitioner to upset this award, when it was clearly guilty of laches by allowing the construction to proceed without pushing for its preliminary injunction, would not be fair and would only result in confusion and chaos. The U.S. Attorney's Office has been in the space for one and a half years and the U.S. District Court is to occupy its former space.

The courts have uniformly held that the courts are "ill equipped to settle the delicate questions involved in procurement decisions". *Elcon Enterprises v. W.M.A.T.A.*, 977 F.2d 1472, 1478 (D.C. Cir. 1992). The complexity of procurement awards and the deference that should be given to an agency decision is discussed in *Kentron Hawaii Ltd. v. Warner*, 480 F.2d 1166, 1182 (D.C. Cir. 1973).

A factor in the finding against the petitioner in the court below was the fact that the U.S. Attorney's Office had moved into the space and that the U.S. District Court for the Western District of New York was going to occupy the space of the U.S. Attorney's Office. Therefore, the cost - social and economic - of interrupting those functions by directing a change just as the United States Attorney's Office has moved into or

is about to move into the Acquest space would be substantial. (Pet. App. 33a-34a).

## POINT 3

## A BALANCING OF THE EQUITIES IS IN FAVOR OF ACQUEST

Although it is submitted that there has been no violation of federal regulations, the injunction sought by petitioner should not be granted even if there was a violation of federal regulations since it may be "inappropriate in order to secure faithful compliance with federal contracting laws, to interrupt" the contract. *Delta Data Systems Corp. v. Webster*, ("Delta Data II") 755 F.2d 938, 939 (D.C. Cir. 1985). Similarly, injunctive relief is not appropriate where it can only be granted "at a cost to the government that would greatly exceed the benefits derived from requiring observance of the proper procedures in the particular case." *Delta Data Systems Corp. v. Webster* ("Delta Data I"), 744 F.2d 197, 207 (D.C. Cir. 1984).

A court's "main objective" in "framing a remedy is to assure that the government obtains the most advantageous contracts by complying with the procedures which congress and applicable regulations provided." *Id.* Even where an agency has violated those procedures, it has been ruled that the public interest in deterring improper procurement practices must be weighed against the harm that injunctive relief would impose on the government. Hence, in *S.W.D. Associates Ltd. v. United States General Service Administration*, 1988 W.L. 242631 (N.D. Cal. 1988), the court ruled that an injunction of performance of a government contract was not warranted where performance had commenced and an injunction would impose substantial cost on the government.

Certainly, in the case at bar to require the U.S. Attorney to vacate space that it has occupied for one and a half years and seek new space would impose extraordinary expense upon the government. GSA would have to commence its procurement process all over again since petitioner's space is no longer available.

## POINT 4

## THERE IS NO CONFLICT AMONG THE CIRCUITS NOR IS THIS AN IMPORTANT ISSUE OF FEDERAL LAW

Acquest respectfully submits that there are no "special and important reasons" for this Court to exercise its discretion to grant the writ of certiorari sought by petitioner. (Sup. Ct. Rule 10.1) The decision of the Court of Appeals for the Second Circuit (the "Decision") does not conflict with the decisions of any other circuit courts on the same matter. It does not involve an important question of federal law. Nor does it decide a federal question in a way that conflicts with the applicable decisions of this Court. The issue is certainly not of sufficient importance for this Court to grant certiorari.

In addition, petitioner does not even claim that the Decision conflicts with any decision of another Court of Appeals or of this Court. It only claims that the Decision conflicts with the decision of the Court of Federal Claims, however, the only issue raised by petitioner was not presented on the appeal to the Court of Appeals for the Federal Circuit. (Pet. App. 8a n.4)

The issue of the validity of GSAR paragraph 552.270.3(a) sought to be raised by petitioner herein is not one which was raised as an issue in the appeal to the Court of Appeals for the Federal Circuit in *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342 (1994), *aff'd*, 39 F.3d 1198 (Fed. Cir. 1994) nor was it an issue for the district court in this case. (Pet. App. 8(a)).

Part of the district court's decision was due to the fact that the petitioner was dilatory in moving for injunctive relief and, during that period of time, Acquest completed construction of the premises and the tenant occupied the premises. The Decision is correct.

The issue involved herein is a matter of minor importance in the overall structure of the law so that resolution of the issue by this court is unnecessary, particularly, when it is

uniformly held that procurement decisions are best decided by agencies, rather than have a reviewing court substitute its judgment for that of the agency. The delicate questions involved in procurement decisions has been well recognized by the courts as best being decided by agencies due to the maze of complex statutory and decisional rules. *Delta Data I*, 744 F.2d at 203.

## CONCLUSION

Therefore, there are no "special and important reasons" for this Court to exercise its discretion to grant the writ of certiorari sought by petitioners.

Dated: June 21, 1995

Respectfully submitted,

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(3)

No. 94-1760

JUN 26 1995

# In the Supreme Court of the United States

OCTOBER TERM, 1994

60 KEY CENTRE, INC., PETITIONER

*v.*

ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, AND ACQUEST HOLDINGS, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

Whether petitioner is entitled to an injunction against performance of a lease for government office space and to award of the lease because the winning bidder for the lease submitted its first bid after the date set by the General Services Administration for submitting initial bids but prior to the date later set for making best and final offers.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-1760

60 KEY CENTRE, INC., PETITIONER

*v.*

ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, AND ACQUEST HOLDINGS, INC.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 47 F.3d 55. The opinion of the district court (Pet. App. 18a-37a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on February 1, 1995. The petition for a writ of certiorari was filed on April 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The federal respondent, the General Services Administration (GSA), issued a solicitation for offers, seeking bids from the owners of office buildings in downtown Buffalo, New York, to lease new office space for the office of the United States Attorney for the Western District of New York. Pet. App. 3a-4a.[1] The solicitation specified that initial bids were due by February 26, 1992. Pet. App. 4a. The solicitation also included a provision specifically stating that "[a]ny offer or modification of an offer which is received after the exact time specified for receipt of *'best and final' offers* will not be considered," unless certain conditions not pertinent here were satisfied. C.A. App. 125 (emphasis added). GSA regulations governing federal acquisition of leasehold interests require that such a provision be included in GSA solicitations of this sort. 48 C.F.R. 552.270-3(a), 570.701-3.[2]

---

[1] The United States Attorney required new office space because the district court for the Western District of New York was preparing an extensive renovation and expansion project for the federal courthouse, where the U.S. Attorney's office was then located, and the project required the U.S. Attorney to vacate its offices in the courthouse. Pet. App. 3a-4a. Because this case thus indirectly affected the judges of the Western District, the case was heard by a district judge for the Southern District of New York, sitting by designation. Pet. App. 3a n.1.

[2] The solicitation uses wording for the late offers clause drawn from the June, 1985, version of Section 552.270-3(a). C.A. App. 125. That regulation was amended on June 2, 1992, effective June 10, 1992. See 57 Fed. Reg. 23,163. The amended regulation differs slightly from the 1985 version, see Pet. 3; Pet. App. 10a, but the differences are not material here.

On February 25, 1992, one day before the date specified in the solicitation for initial bids, petitioner submitted a proposal to lease space in its building. Pet. App. 4a. GSA did not accept any bid at that time. Instead, following routine GSA procedures, it negotiated with the bidders over possible changes in their proposals. Pet. App. 4a, 20a.

During the negotiation process, respondent Acquest Holdings, Inc. (Acquest), submitted its own initial bid on August 10, 1992, a date several months after the date specified in the solicitation for initial bids. Pet. App. 4a. GSA then established a deadline of November 18, 1992, for submission of a new round of "best and final" offers. Both petitioner and Acquest submitted best and final offers by that deadline. *Ibid.* GSA considered Acquest's offer to be timely because it interpreted the regulation, Section 552.270-3(a), as incorporated in the solicitation provision regarding offers received after the time set for best and final offers, to mean that offers are timely if received before the date for best and final offers, even if the offeror did not meet the deadline for initial offers as set forth in the solicitation. Pet. App. 4a.

GSA then evaluated the best and final offers. Acquest scored 17 points higher (out of 100) than petitioner on the five "Award Factor Criteria" (security, quality, location, space layout, and delivery), and its offer had a lower overall price. Pet. App. 4a-5a. As a result, GSA awarded the lease to Acquest on January 22, 1993. Pet. App. 5a.

2. Petitioner immediately filed a bid protest with the General Accounting Office, but the GSA determined, under 31 U.S.C. 3553(d)(2), that Acquest should be permitted to continue performance of the contract, pending resolution of the protest. Pet. App.

5a.[3] On February 23, 1993, petitioner filed a complaint in district court. The complaint sought an injunction prohibiting GSA and Acquest from proceeding with the award of the lease, and a declaratory judgment directing GSA to award the lease to petitioner. Pet. App. 5a-6a. Petitioner did not move for a preliminary injunction until June 3, 1993, and it did not submit its memorandum of law on the motion until October 15, 1993. Pet. App. 6a. At the hearing on the preliminary injunction motion on December 22, 1993, the district court accepted petitioner's suggestion that the court combine that hearing with the trial on the merits. *Ibid.* Shortly after the hearing, and before the district court's decision, Acquest substantially completed construction of the new office space and the United States Attorney moved into the building. *Ibid.*

On January 25, 1994, the district court issued its decision, rejecting each of petitioner's claims about the bid award and dismissing petitioner's complaint. Pet. App. 18a, 24a-37a. With respect to petitioner's claim that Acquest's bid was untimely, the district court held that Acquest was not required to submit its offer by the time specified in the solicitation for initial offers. Pet. App. 28a-29a. The court relied on

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[3] Under 31 U.S.C. 3553(d)(1), the contractor ordinarily must cease performance pending any bid protest, but 31 U.S.C. 3553(d)(2)(A) provides that the agency that awarded the contract "may authorize the performance of the contract (notwithstanding a protest * * * )" if it makes a written finding "(i) that performance of the contract is in the best interests of the United States; or (ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting" for GAO's decision on the protest.

Section 552.270-3(a), concluding that "[that] regulation makes it plain that the critical date is the deadline for [best and final offers]," not the deadline for initial bids. Pet. App. 29a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The only issue that the court specifically discussed was the timeliness of Acquest's offer. The court acknowledged that the Court of Federal Claims had recently held that the GSA regulation, 48 C.F.R. 552.270-3(a), is invalid. Pet. App. 8a, citing *Aerolease Long Beach* v. *United States*, 31 Fed. Cl. 342, aff'd, 39 F.3d 1198 (Fed. Cir. 1994) (Table). However, the court considered and rejected each of the three rationales put forth in *Aerolease* for invalidating the regulation.

First, the court held that the regulation does not conflict with a provision of the Competition in Contracting Act (CICA), which provides that "each solicitation * * * shall at a minimum include * * * the time and place for submission of proposals." 41 U.S.C. 253a(b)(2)(B)(ii). The court noted that "GSA included a time for submission of offers in the [solicitation]," and that the solicitation thus "compl[ied] with the literal requirement of [the CICA]." Pet. App. 11a. In any event, the statute "does not assert any penalty for bid submissions after this date," *ibid.*, and it was thus consistent with GSA's regulation providing that late bids will be accepted until the date set for best and final offers. The court also stated that allowing additional proposals up to the deadline for best and final offers serves "a predominant purpose" of CICA "to augment competition" by allowing more bidders to participate in the process. Pet. App. 11a-12a.

Second, the court of appeals held that the GSA regulation does not conflict with Federal Acquisition

Regulation (FAR) § 15.412(c), 48 C.F.R. 15.412(c), which provides: "Proposals, and modifications to them, that are received in the designated Government office after the exact time specified are *late* and shall be considered only if" certain conditions not present in this case are satisfied. The court reasoned that this provision "does not mandate any particular action by the GSA with respect to setting the deadlines to which those consequences will attach." Pet. App. 13a. The court also noted that the FAR provision "does not define what constitutes a late submission, and therefore does not contradict the GSA's policy of accepting proposals before the deadlines for [best and final offers]." *Ibid.*

Third, the court rejected the argument that it is unfair to the other bidders to allow a bidder to compete even when it did not submit a timely initial offer. GSA's regulations clearly set forth its policy of accepting bids until the deadline for the best and final offer, and petitioner and the other bidders accordingly "were or should have been aware * * * of the GSA's policy to allow late bids until the [best and final offer] deadline." Pet. App. 14a. In addition, the court noted that the early bidders have an advantage over later bidders because they have more time to negotiate with GSA over changes in their initial proposals. *Ibid.* In any event, the court concluded, federal procurement statutes and regulations "are not designed to establish private 'entitlements' to public business, but rather to produce the best possible contracts for the government in the majority of cases." *Ibid.*, quoting *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 206 (D.C. Cir. 1984).

## ARGUMENT

Petitioner renews its contentions that the GSA regulation governing timeliness of a bid submitted after the date for initial bids but before the date for best and final offers is invalid. The court of appeals' decision on that issue is correct, and it does not conflict with any decision of this Court or any other court of appeals.[4] Moreover, even if petitioner's legal arguments were correct, it is doubtful that at this late date, the courts could properly order the relief petitioner seeks—the award of the contract and an injunction against performance of the contract with Acquest.

1. Petitioner contends (Pet. 8-9) that the GSA regulation violates a provision in the Competition in Contracting Act (CICA), 41 U.S.C. 253a(b)(2)(B)(ii), which provides that each solicitation for offers, where there are to be competitive proposals, must include "the time and place for submission of proposals." Agreeing with the decision of the Court of Federal Claims in *Aerolease*, see 31 Fed. Cl. at 366, petitioner argues that Section 552.270-3(a) is inconsistent with that statute.[5]

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[4] The decision of the court of appeals does appear to conflict with the decision of the Court of Federal Claims in *Aerolease*. Although the Federal Circuit affirmed the decision of the Court of Federal Claims in *Aerolease*, the issue of the validity of the GSA regulation was not presented on appeal, "apparently because the party against whom the ruling on [the GSA regulation] was directed did not participate in the appeal." Pet. App. 8a n.4.

[5] Petitioner seems to renew its suggestion (Pet. 8) that GSA erroneously interprets Section 552.270-3(a) to allow bids up to the time of the deadline for best and final offers. The language of the regulation, however, which generally prohibits con-

The statute by its terms requires only that a solicitation for competitive bids include a "time and place for submission of proposals." The solicitation here included such a designation of time and place. Pet. App. 4a. Petitioner argues, however, that the statute must be interpreted not only to require that solicitations set a definite time for submission of bids, but also to require automatic disqualification of bidders who fail to submit bids by the specified date. According to petitioner, failure to impose disqualification in those circumstances would "render[] [the statutory requirement] meaningless." Pet. 9.

The court of appeals' construction of the statute would not render it meaningless. As interpreted by the court, the statute serves the function of providing bidders a date by which they can submit initial proposals without fear that their bids will be rejected as too late. By submitting its bid by that date, petitioner ensured that its bid would be considered before a contract was awarded. Bidders like Acquest, who submit bids later, have no such assurance, since an agency could accept an initial bid or negotiate a final bid before a late bidder had the opportunity to enter

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sideration of offers received after the time specified for best and final offers, is inconsistent with that contention. (The 1985 version of the regulation also stated that the time for receipt of "[a]ny offer" is "the exact time specified for receipt of 'best and final' offers" (C.A. App. 125)). At any rate, as the court of appeals concluded (Pet. App. 9a), an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994).

the contest. The statute's requirement that a solicitation specify a time and date for initial bids therefore serves an important function, even if an agency determines that later bids will be considered.

This explanation of Section 253a(b)(2)(B)(ii) reflects the important underlying purpose of CICA "to increase the use of competition in Government contracting" and "to safeguard against unnecessary sole-source contracts." H.R. Rep. No. 861, 98th Cong., 2d Sess. 1421 (1984). See also S. Rep. No. 50, 98th Cong., 1st Sess. 7 (1983). To that end, Congress required agencies to adopt "policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements * * * at the lowest reasonable cost." 41 U.S.C. 414(1). In accordance with that obligation, GSA determined that—at least with regard to the fluid market for lease of real estate—it is in the best overall interest of the government to use a flexible deadline in order to assure that no bidder that can make a superior offer would be prematurely frozen out of the procurement process. That approach worked well here, since Acquest's proposal was significantly superior to petitioner's. Pet. App. 4a-5a, 20a-21a.

2. Petitioner also argues (Pet. 9-10) that Section 552.270-3(a) is contrary to a provision of the general Federal Acquisition Regulations, 48 C.F.R. 15.412(c), which provides that "[p]roposals, and modifications to them, that are received in the designated Government office after the exact time specified are *late* and shall be considered only" under certain limited circumstances not applicable here.

The GSA regulation does not violate the FAR provision. The FAR provision requires that bids be submitted by "the exact time specified" by the contracting agency. It does not define that time, require that the time be included in a solicitation, or provide for the consequences if it is not. Here, the solicitation included a February 26, 1992, due date for initial proposals, but it also included the full text of the special GSA regulation applicable to leases of real estate. That regulation indicated that proposals could be submitted after the date for initial bids, as long as GSA received them before the deadline for best and final offers. C.A. App. 125. The solicitation thus did not contain any "exact time" for proposals, and no such time was set until GSA announced the "best and final offers" deadline. Acquest's bid was in fact submitted by that deadline. The bid was therefore timely under both the GSA regulation and the FAR provision.

Even if Section 552.270-3(a) did conflict with FAR Section 15.412, however, the GSA regulation would not be invalid. The GSA regulation applies only to the lease of real property. See 48 C.F.R. 570.701-3. Under Section 6(a)(1) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a)(1), however, the FAR does not apply to procurement of "real property in being." Congress explained that this provision excludes from the FAR "the acquisition of a fee, easements, *leases*, or other interests in existing buildings and land." S. Rep. No. 692, 93d Cong., 2d Sess. 18 (1974) (emphasis added).[6] Accordingly, any

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[6] See also H.R. Rep. No. 1176, 93d Cong., 2d Sess. 13 (1974) (the FAR "does not extend to Government acquisition of the fee or other interests in land and existing improvements or in

inconsistency between the GSA regulation and the FAR would not render the GSA regulation invalid.

The Court of Federal Claims in *Aerolease* rejected this argument, 31 Fed. Cl. at 377, relying principally on *Forman* v. *United States*, 767 F.2d 875 (Fed. Cir. 1985). In our view, the Court of Federal Claims erred. We believe that *Forman* was incorrectly decided,[7] and it would not in any event be controlling on the facts of this case, since the Federal Circuit in *Forman* did not construe Section 405(a)(1), but instead construed a similarly worded provision of the Contract Disputes Act. In any event, the court of appeals in this case did not address the question at issue in *Forman*—whether the FAR governed acquisitions of leaseholds by the federal government—because it held that the GSA regulations at issue here are consistent with the FAR. That holding was correct, and this case therefore does not present the question whether the GSA regulations would be valid if they were inconsistent with the FAR.

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parts thereof (*such as office space*), whether by deed, *lease*, license or" other instruments) (emphasis added).

[7] *Forman*'s explanation of the legislative history—that it meant to exclude from the FAR only the government's acquisition of an existing lease from a third party, not the creation of a new lease with the government, 767 F.2d at 879—is in our view wrong. The House and Senate Reports both listed many types of interests in real property whose acquisition Congress intended to exclude from the FAR. Both Reports included leases among the interests to be excluded. There is no basis for reading those references to leases as limited to the narrow class of cases in which the government assumes a third party's existing lease, nor is there any apparent reason why Congress would have wanted to adopt such a limitation.

3. Petitioner also argues (Pet. 11) that the GSA regulation is "unfair" and violates the "spirit and intent of CICA." Petitioner relies on the decision of the Court of Federal Claims in *Aerolease*, which held that the CICA creates an "implied obligation of the Government to consider all bids and proposals fairly and honestly." 31 Fed. Cl. at 367.

Petitioner (Pet. 11-12) argues that the GSA regulation is unfair because those who made initial offers by the date stated in the solicitation "must keep their bids open for an indeterminate period of time when no similar obligation is imposed upon late bidders." Pet. 11. There is nothing unfair about that situation. Since the solicitation indicated that offers could be submitted up to the deadline for best and final offers, petitioner was fully on notice from the outset that later bids would be accepted. Indeed, petitioner itself had the option of submitting a later bid, as did Acquest. Instead, petitioner chose to avail itself of the benefits of submitting an earlier bid, including the opportunity for more time in which to negotiate with GSA over possible changes in its proposal before the deadline for best and final offers. Although petitioner may have assumed additional costs as well, that is a choice that petitioner made when it determined its strategy for bidding on the contract in this case.[8]

4. Finally, even if the GSA regulation did violate CICA or the FAR, petitioner would not be entitled to judgment in this case. Federal agencies' procure-

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[8] Any added cost incurred as a result of the need to keep a bid open a few additional weeks in this case is likely not to be significant in the context of the lease whose award is at issue. The lease was to be for a term of ten years, with two five-year extension options. Pet. App. 4a.

ment decisions cannot be set aside "unless they 'had no rational basis' or the process by which they were reached 'involved a clear and prejudicial violation of applicable statutes or regulations.'" *Elcon Enterprises, Inc.* v. *Washington Metropolitan Area Transit Authority*, 977 F.2d 1472, 1478 (D.C. Cir. 1992), quoting *Kentron Hawaii, Ltd.* v. *Warner*, 480 F.2d 1166, 1169 (D.C. Cir. 1973). See also *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 203-207 (D.C. Cir. 1984) (Scalia, J.). For the reasons given above, even if GSA could be found to have violated the CICA or the FAR, its error could not be characterized as clear or irrational.

Moreover, petitioner would not in any event be entitled to an award of the contract in this case. By the time of the district court decision in January, 1994, petitioner had already leased out at least part of its space, and thus was no longer able to perform on the terms of its best and final offer. Pet. App. 34a-35a. Moreover, because the United States Attorney's Office has long ago moved into the Acquest space, awarding the contract to petitioner at this point and requiring that Office to move once again would impose substantial costs on the government and could disrupt government functions. Such costs and disruption would be the result in part of petitioner's failure to file and fully brief its preliminary injunction motion until eight months after the complaint was filed in this case, during which time Acquest was building its structure and the United States Attorney's Office was preparing its move. Since "[petitioner] itself bears substantial responsibility for the delay" (Pet. App. 34a), the equitable factors governing a court's intervention into the government procurement process, see, *e.g.*, *Sea-Land*

*Serv., Inc.* v. *Brown*, 600 F.2d 429, 434 (3d Cir. 1979); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971), would in any event preclude judgment for petitioner in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1760

In The

# Supreme Court of the United States

October Term, 1994

60 KEY CENTRE, INC.,

*Petitioner,*

*vs.*

ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION and ACQUEST HOLDINGS, INC.,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## REPLY BRIEF FOR PETITIONER

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## PRELIMINARY STATEMENT

This Brief is submitted on behalf of Petitioner, 60 Key Centre, Inc., ("60 Key") pursuant to Rule 15.6 of the Rules of the Supreme Court in reply to the opposing briefs submitted by Respondents, Administrator of General Services Administration ("GSA") and Acquest Holdings, Inc. ("Acquest").

There are three arguments raised in Respondents' opposing briefs which merit reply: (1) that the issue of the lease award is moot; (2) that Petitioner unnecessarily delayed in moving for injunctive relief; and (3) that the solicitation for offers contemplates "rounds of bidding".

## REPLY ARGUMENT

### I.

### MOOTNESS

The Respondents both assert that regardless of the propriety of the government's actions, Petitioner could not be entitled to award (GSA.13, Acquest.2-3) since Petitioner had leased part of the space offered and thus would be unable to perform on the terms set forth in its best and final offer. This argument is without factual basis and was erroneously relied upon by the lower courts. There is no admissible evidence in the record supporting Respondents' contention that Petitioner would be unable to perform. Petitioner maintains, as it has repeatedly stated, that it stands ready to perform if awarded the lease.

Further, Respondent Acquest states that the bid of Petitioner was the worst of the three bids submitted and it would not have received the award in any event. This argument is likewise erroneous. 60 Key challenged the scoring system in the courts

below and more importantly, at the time of the lease award, Acquest and 60 Key were the only remaining offerors. Thus, had Acquest been excluded from the bidding, as it should have been, 60 Key would have been the recipient of the award in any case.

## II.

## PERCEIVED DELAY IN PETITIONER'S MOVING FOR INJUNCTIVE RELIEF

The Respondents also both assert that Petitioner was dilatory in moving for injunctive relief (Acquest.5, GSA.13) which permitted the U.S. Attorney's Office to occupy Acquest's offered space during the pendency of this action and thus the equities militate against the relief sought by 60 Key. 60 Key is not responsible for any delay in these proceedings. The District Court set the briefing schedule, with full knowledge of the facts and circumstances in this matter, to which 60 Key merely adhered. 60 Key had sought injunctive relief from the General Accounting Office well before this action was commenced, but the GSA nonetheless allowed Acquest's continued performance. 60 Key also had to repeatedly seek court intervention to secure Respondents' compliance with its discovery requests which significantly lengthened these proceedings.

It is inequitable to penalize or accuse Petitioner of laches for simply following the court-imposed schedule.

## III.

## THE SUBMISSION DUE DATE AND PROCUREMENT PROCESS

Contrary to the argument advanced by the GSA, the solicitation for offers (SFO) did not state that "initial" bids were due by February 26, 1992 nor that a new round of best and final

offers would be later established (*see generally*, GSA.2-3). The concept of "initial bids" and "new rounds" of offers does not exist in the terminology of the SFO nor is it envisaged by the Competition in Contracting Act, the General Services Administration Regulations or the Federal Acquisition Regulations.

Section 1.5 of the SFO states: "Offers are due by February 26, 1992 and must remain open until August 3, 1992." These requirements of the SFO clearly indicate that negotiation and award will take place within that time frame. Because offers were required to remain open until August 3, 1992, obviously the best and final offer due date would have had to be some time prior to August 3, 1992. Acquest did not even submit its offer until August 10, 1992. Therefore, Acquest did not respond within the time period contemplated for the entire negotiation and award process in this solicitation.

According to GSA, (GSA.12) early bidders such as Petitioner benefit from a longer period in which to negotiate changes in their proposals than do late bidders such as Acquest. However, on the facts of this case, Acquest clearly enjoyed an extended risk-free negotiation period and any claimed benefit to 60 Key was thereby nullified, not to mention costly in view of the length of time its offer was held open.

GSA argues (GSA.8-9) that the flexible deadline serves the underlying purposes of CICA to increase competition and safeguard against unnecessary sole-source contracts, by assuring that no bidder is prematurely frozen out of the procurement process.

This argument, taken to its logical extreme, will effectively assure that there is less competition since many rational parties will choose not to do business with the government on these

terms. According to GSA's own argument, there never needs to be any firm dates or finality with respect to considering offers since expanding the field will always benefit the government by increasing the number of offers.

The result of such unrestrained government conduct in direct contravention of the applicable statutes, is both unlawful and inherently unfair and has the opposite effects of those intended by Congress.

## CONCLUSION

For the foregoing reasons and those set forth in 60 Key Centre, Inc.'s Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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